

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

EVAN L CARNAHAN,

Plaintiff,

NO. 2:17-cv-0086-SAB

V.

ALPHA EPSILON PI FRATERNITY
INC.,

ORDER DENYING RECONSIDERATION

Defendant.

Before the Court is Defendant's Motion for Reconsideration, ECF No. 124.

Defendant seeks reconsideration of this Court's Order at ECF No. 121, denying

Defendant's Motion for Leave to Conduct Trial Perpetuation Deposition, ECF No. 105.

Background

During expert discovery, Plaintiff disclosed David Easlick as a liability expert who would testify in support of Plaintiff's claims against Alpha Epsilon Pi Fraternity Inc. (AEP). ECF No. 105. Plaintiff listed Mr. Easlick on Plaintiff's expert disclosures and provided an expert report for Mr. Easlick. *Id.* AEP settled with Plaintiff before the scheduled deposition occurred, withdrawing their notice of deposition for Mr. Easlick. On June 19, 2018, while the original discovery deadline was open, AEP was dismissed *Id.* Defendant Leon did not note Mr. Easlick for a deposition at that time. Discovery closed on July 2, 2018. On August 6, 2018,

1 Defendant Leon informed Plaintiff that he was planning to call Mr. Easlick as a
2 witness. ECF No. 75. Plaintiff objected, on August 10, informing Defendant that
3 Plaintiff was no longer intending to call Mr. Easlick due to AEP's dismissal, and
4 thus Plaintiff considered Mr. Easlick to be a consulting witness under Fed. R. Civ.
5 P. 26(b)(4)(D). Defendant filed a motion to take a trial perpetuation deposition of
6 Mr. Easlick, ECF No. 105, which this Court denied. ECF No. 121.

7 **Reconsideration Standard**

8 Motions for reconsideration are generally disfavored and are considered an
9 "extraordinary remedy, to be used sparingly in the interest of finality and
10 conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229
11 F.3d 877, 890 (9th Cir. 2000). A motion for reconsideration "should not be
12 granted, absent highly unusual circumstances, unless the district court is presented
13 with newly discovered evidence, committed clear error, or if there is an intervening
14 change in the controlling law." *389 Orange Street Partners v. Arnold*, 179 F.3d
15 656, 665 (9th Cir. 1999).

16 Motions for reconsideration "may not be used to raise arguments or present
17 evidence for the first time when they could reasonably have been raised earlier in
18 the litigation." *Kona*, 229 F.3d at 890. Whether or not to grant reconsideration is
19 committed to the sound discretion of the court." *Navajo Nation v. Confederated*
20 *Tribes and Bands of the Yakama Indian Nation*, 331 F.3d 1041, 1046 (9th Cir.
21 2003).

22 **Analysis**

23 The root question is whether one party is entitled to call as an expert witness
24 a witness originally listed as a testifying witness but then purportedly converted to
25 a consulting witness. The parties are divided as to what test applies to this question
26 – the exceptional circumstances test for consulting witnesses, or the general rule of
27 availability for experts expected to testify. Courts are divided on this question as
28

1 well. *See Blumhorst v. Pierce Mfg., Inc.*, No. 4:10-CV-00573-REB, at *2 (D. Idaho
2 Oct. 7, 2014) (noting different approaches.)

3 Some courts and scholars have inferred a general principle of “unfairness”
4 from the Advisory Committee’s Notes to Rule 26, stating that “it is unfair for one
5 party, without expense, to obtain information from an expert who has been hired
6 by the opposing party for an agreed compensation.” Jack H. Friedenthal, *Discovery*
7 *and Use of an Adverse Party’s Expert Information*, 14 Stan.L.Rev. 455, 472
8 (1962). Based on this principle, courts have denied opposing parties the
9 opportunity to convert an opposing party’s re-designated consulting witness absent
10 “exceptional circumstances,” using the general test for consulting witnesses. *See*
11 *Ager v. Jane C. Stormont Hosp.*, 622 F.2d 496, 502 (10th Cir.1980) (defining the
12 unfairness rule as a rule “designed to prevent a party from building his own case by
13 means of his opponent’s financial resources, superior diligence and more
14 aggressive preparation”).

15 Other courts and scholars hold that “once an expert is designated, the expert
16 is recognized as presenting part of the common body of discoverable, and
17 generally admissible, information and testimony available to all parties.” *See*
18 *House v. Combined Ins. Co.*, 168 F.R.D. 236, 245 (N.D. Iowa 1996), *accord*
19 Wright & Miller, *Federal Practice and Procedure: Civil* § 2032. Thus, they hold
20 that “designation of an expert as expected to be called at trial, pursuant to
21 Fed.R.Civ.P. 26(b)(4)(A), even if that designation is subsequently withdrawn,
22 takes the opposing party’s demand to depose and use the expert at trial out of the
23 ‘exceptional circumstances’ category of Rule 26(b)(4)(B),” and use a discretionary
24 standard. *House*, 168 F.R.D. at 245. The standard is a “balancing” test, weighing
25 the probative value of the expert’s potential testimony against the prejudice and
26 unfairness that would arise from one party another’s decision to not call an expert.

27 *Id.*

1 Under either of these tests, Defendant has not met the high bar for
2 reconsideration. Under the balancing test, the Court does not find that denial of the
3 motion was clear error. There are at least two potential sources of prejudice, one
4 arising from the proximity to trial, and the other from Plaintiff being placed in the
5 awkward position of cross-examining their own expert. *See Ferguson v. Michael*
6 *Foods, Inc.*, 189 F.R.D. 408 (D. Minn. 1999). The Court lacks the necessary
7 briefing to determine the probative value of Mr. Easlick's potential testimony.

8 Under the exceptional circumstances test, the Court finds that there are not
9 exceptional circumstances to allow Defendant to depose a consulting witness.
10 During the year-and-a-half that this issue was unresolved Defendant did not note
11 Mr. Easlick for a deposition after AEP's dismissal, and took no steps to procure
12 their own expert on this issue or move for an extension of the deadline for expert
13 disclosure and discovery. With a trial date quickly approaching, the time for noting
14 an expert has long since passed.

15 The Court therefore denies the Motion for Reconsideration. However, the
16 Court would entertain and allow the filing of a renewed motion with a showing of
17 the relevancy of Mr. Easlick's potential testimony and a motion for a continuance
18 of the approaching trial date.

19
20 Accordingly, **IT IS ORDERED:**

21 1. Defendant's Motion for Reconsideration, ECF No. 124, is **DENIED**.

22 **DATED** this 13th day of December 2019.

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26 Stanley A. Bastian
27 United States District Judge
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